

**WONG HUANG ING v. PP**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU  
RAVINTHRAN PARAMAGURU J  
[CRIMINAL CASE NO: BKI-42-3-6-2014]  
2 JUNE 2015

**CRIMINAL PROCEDURE:** *Forfeiture – Dangerous drugs – Forfeiture of property under Dangerous Drugs (Forfeiture of Property) Act 1988 – Statutory presumption under s. 35 of the Act – Whether applied under an inquiry under s. 32 – Claimant’s failure to prove on balance of probabilities that property was not illegal and he was entitled to it – Whether Sessions Court Judge correctly dismissed claim to property*

The appellant had been arrested for an offence under s. 39B of the Dangerous Drugs Act 1952. The police found drugs inside the residential property (‘the property’) belonging to the appellant. However, the appellant was not charged in court for any offence. The property was seized by the police under s. 25(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 (‘the Act’). The appellant and Public Bank Bhd filed a claim under s. 32(1)(c) of the Act for the said property. At the inquiry before the Sessions Court, both claimants were represented by their respective lawyers. However, the appellant did not take the witness stand or call any witnesses to support his claim to the property. At the conclusion of the inquiry, the Sessions Court dismissed the claim of both claimants and ordered the property be forfeited to the Government of Malaysia. Hence, the appellant appealed. The main issue raised herein was the application of the presumption under s. 35 of the Act by the Sessions Court Judge.

**Held (dismissing appeal):**

- (1) The Sessions Court Judge, in holding that the statutory presumption applied to an inquiry under s. 32 of the Act, had considered herself bound by the Court of Appeal decision in *Cherian KC George and Anor v. PP*. The Sessions Court Judge apparently did not follow a latter Court of Appeal case of *PP v. Lim Kim Hoei & Anor* which held that the statutory presumption in s. 35 did not apply to an inquiry under s. 32. The majority in the latest Court of Appeal case *Jason Chan Huan Sen & Ors v. PP* also held that the statutory presumption did not apply to a s. 32 inquiry. But it must be taken into account that the majority also held that a claimant was obliged to prove on a balance of probabilities that the property was not illegal property and that he was lawfully entitled to it. (para 7)
- (2) Although there was no statutory presumption that the property was illegal property, under s. 32 of the Act, the accused was obliged to tender evidence on a balance of probabilities to prove his claim that the property was not illegal property and that he was lawfully entitled to it. The only evidence to support the appellant’s claim was the salary slips

- A tendered by the officer of the Public Bank and letter of confirmation from the employer in 2006 that the appellant worked for them. The said salary slip only pertained to the period when the loan application was processed in 2006. On the other hand, the prosecution had tendered evidence to the effect that the source of income of the appellant for the subsequent period between 2006 and 2013 was dubious. In the premises, this court agreed with the Sessions Court Judge that the appellant should have taken the witness stand to affirmatively tender evidence, either oral or documentary, in respect of the source of his income for the period 2006 to 2013. Since he failed to do so, the Sessions Court Judge had correctly dismissed his claim to the property in question. (paras 12 & 13)

**Case(s) referred to:**

*Cherian KC George & Anor v. PP [2012] 6 CLJ 17 CA (refd)*

*Jason Chan Huan Sen & Ors v. PP [2015] 2 CLJ 605 CA (refd)*

*PP v. Lim Kim Hoei & Anor [2014] 4 CLJ 816 CA (refd)*

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**Legislation referred to:**

Dangerous Drugs Act 1952, s. 39B

Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 25(1), 32(2), (3), 35

*For the appellant - Mohammad Nor Yusof; M/s Nohin & Partners*

*For the respondent - Luke Ressa Balang DPP*

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*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Ravinthran Paramaguru J:**

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[1] This is an appeal against the decision of the Sessions Court Judge pursuant to an inquiry under s. 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 (the Act). The learned Sessions Court Judge had ordered that a residential property belonging to the appellant be forfeited to the Government of Malaysia. Before the Sessions Court, the appellant was the second claimant. The first claimant was Public Bank Berhad.

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**Background Facts**

[2] The property in question is known as Unit No A-6-G, Block A, Taman Ganang Phase 1, Jalan Pahlawan, 88200 Kota Kinabalu. The appellant was arrested on 3 October 2013 for an offence under s. 39B of the Dangerous Drugs Act 1952. The police found drugs inside the residential property in question. However, the appellant was not charged in court for any offence. The property was seized by the police under s. 25(1) of the Act. The provision reads as follows:

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25. Seizure of movable property.

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(1) Any movable property which a senior police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the commission of that offence, or illegal property, shall be liable to seizure.

[3] The appellant and Public Bank Bhd filed a claim under s. 32(1)(c) of the Act for the said property. Public Bank Bhd had granted a loan to the appellant to purchase the said property. The Public Prosecutor, in accordance with s. 32(2) of the Act referred the claims of the appellant and Public Bank Bhd to the Sessions Court. The duty of the Sessions Court in an inquiry under s. 32(3) is as follows:

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... the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited."

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[4] At the inquiry before the Sessions Court, both claimants were represented by their respective lawyers. However, the second claimant who is now the appellant did not take the witness stand or call any witnesses to support his claim to the property in question. Public Bank Bhd called two of its officers as witnesses.

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[5] At the conclusion of the inquiry, the Sessions Court dismissed the claim of both claimants and ordered the property to be forfeited to the Government of Malaysia. The first claimant, Public Bank Bhd did not appeal against the decision of the Sessions Court. However, the second claimant who is the appellant has appealed against the decision.

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#### Issues

[6] The main issue raised in this appeal is the application of the presumption under s. 35 of the Dangerous Drugs (Forfeiture of Property) Act 1988 by the Sessions Court Judge. Section 35 enacts as follows:

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35. Presumption as to liable person and illegal property.

Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

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[7] The learned Sessions Court Judge held that the presumption applies to an inquiry under s. 32. She considered herself bound by the Court of Appeal decision in *Cherian KC George and Anor v. PP* [2012] 6 CLJ 17 which held that the presumption in s. 35 applies to "any proceeding" including a

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A proceeding under s. 32. She apparently did not follow the conflicting position adopted in the latter Court of Appeal case of *PP v. Lim Kim Hoei & Anor* [2014] 4 CLJ 816. In *PP v. Lim Kim Hoei & Anor (supra)*, a different panel of the Court of Appeal held that the statutory presumption in s. 35 does not apply to an inquiry under s. 32. However, the latest Court of Appeal case on the applicability of the presumption under s. 35 to a s. 32 inquiry was not cited to her. The said Court of Appeal case is *Jason Chan Huan Sen & Ors v. PP* [2015] 2 CLJ 605. A special quorum of five judges heard the said appeal. The Court of Appeal by a majority of 4 to 1 held that the statutory presumption does not apply to a s. 32 inquiry. However, the majority of the Court of Appeal held that a claimant is still obliged to prove on a balance of probabilities that the property is not illegal property and that he is lawfully entitled to it. This is clear from the following passage in the majority judgment.

D With respect, from our reading of section 32 of the FOP Act the forfeiture of the seized property crystallises, not because there has been an affirmative application by the Public Prosecutor against the property for it to be forfeited, but rather, through effluxion of time where there is no claim over the property by any person under circumstances mentioned under section 32(1), namely by operation of law, or *where the Sessions Court is not satisfied that the person claiming under section 32(3) has successfully proven that he is the person who is lawfully entitled to the seized property and that he has failed to show to the Court that the property was not illegal property.* (emphasis added)

[8] On the other hand, the claimant is not required to rebut the statutory presumption under s. 35 that the property is illegal property. The following passage from the majority judgment emphasises this point clearly:

F At the risk of being repetitive, his burden to affirmatively prove that the property is not illegal property, does not arise from the invocation of the presumption of illegal property that is housed under section 35 of the FOP Act.

G [9] In the above mentioned case as well, the Court of Appeal considered the question whether the claimant had satisfied his burden on a balance of probabilities. The majority judgment noted that in respect of a number of properties, the claimant did not lead evidence to prove that the properties are not illegal properties and that he is lawfully entitled to them. This approach is reflected in the following passages of the majority judgment:

H Counsel for the Appellants conceded that for a number of the seized properties there was no evidence led by the Appellants to prove that the properties are not illegal properties and that the Appellants are lawfully entitled to them.

I In our view, as the burden of such proof is on the Appellants, the admitted absence of such evidence means that that burden has not been discharged by the Appellants. The Sessions Court was therefore correct in refusing to order the release of such properties to the Appellants.

[10] The majority judgment thus only considered the correctness of the decision of the Sessions Court in respect of properties where evidence had been led to prove that the said properties were not illegal properties. Coming back to the instant case, with the benefit of the decision of the Court of Appeal in *Jason Chan Huan Sen & Ors v. PP (supra)*, the ruling of the Sessions Court Judge that the presumption in s. 35 applied to the instant case cannot be sustained. However, as I said earlier, the appellant is not relieved of his burden to lead evidence to prove that the property in question is not illegal property and that he is legally entitled to it. I shall consider the issue below.

#### Evidence Relied On By Appellant

[11] As I noted earlier, the appellant did not lead any evidence to prove that the property in question is not illegal property and that he is legally entitled to it. He did not testify and did not call any witnesses. Instead, his counsel relied on the documents adduced by the witnesses of Public Bank Bhd to support his claim. Betty bt Onong who is an officer of Public Bank Bhd testified that a loan of RM132,614 was granted to the appellant in 2006 for the purchase of the property in question. She said that as at 17 April 2014, the outstanding amount was RM81,619. She said that the bank did not investigate the employment background of the appellant when the loan was granted in 2006. However, during re-examination, she said that the employer of the appellant, ie, Bagus Guna Sdn Bhd confirmed that the salary of the appellant was RM3,000 per month. The appellant worked as a site supervisor. The monthly instalment payable for the loan was RM814. The second witness called by Public Bank was Ling How Gong. He is the officer who approved the loan in question. He collected salary slips from the appellant for the period January 2006 to March 2006 from the appellant to process the loan application. However, he said that he did not check the background of the employer of the appellant, ie, Bagus Guna Sdn Bhd with the Companies Commission of Malaysia.

#### Decision

[12] In my opinion, appellate interference with her decision to forfeit the property to the Government of Malaysia is not warranted for the following reasons. Despite the misdirection on the application of the statutory presumption, the learned Sessions Court Judge found that the appellant failed to tender evidence to support his claim that the property in question was not illegal property and that he was lawfully entitled to the same. As I said earlier, the appellant did not take the witness stand or call witnesses. The documents he relied on are the salary slips tendered by the witnesses from Public Bank and the letter of confirmation that he worked as a site supervisor at that time. The appellant purchased the property in question in 2006. The property was seized in 2013. The loan had not been fully repaid as RM81,619 was still due to Public Bank Bhd. According to Ling How Gong

- A who processed the loan application, he only collected salary slips for a three month period in 2006 and letter of confirmation from the employer. It showed that the appellant received a salary of RM3,000 per month from Bagus Guna Sdn Bhd. He did not inquire into the background or legitimacy of the source of income. This is not surprising as the bank was only
- B concerned with the creditworthiness of the borrower. As the appellant did not take the witness stand to give evidence about his sources of income since 2006, the only other evidence in respect of his income came from the investigating officer (Inspector Roziah binti Abdul Rashid). However, the investigating officer cast serious doubts on the legitimacy of the source of
- C income of the appellant after the year 2006. The appellant was a director of Borneo Fokus Jaya Sdn Bhd and Megashine Sdn Bhd by 2012. Although, the appellant told the investigating officer that his income per month from Borneo Fokus Jaya Sdn Bhd is RM4,000 per month, her investigation with the Companies Commission of Malaysia revealed that the said company did not report any profits as at 10 August 2012. The appellant was director of
- D another company, ie, Megashine Sdn Bhd. However that company did not report any profits either. In the course of investigating the case, the accused gave some so-called salary slips to the investigating officer for the year 2013. These slips are in the form of payment vouchers from Borneo Fokusjaya Sdn Bhd. They were issued to the appellant in the year 2013. However, she noted
- E that the payment vouchers were incomplete. There was no reference to ledger numbers, cash book etc. She also investigated with the Inland Revenue Board about income declaration of the appellant from the year 2008 onwards. She found that the appellant had not declared any income for the years 2008 and 2011. For 2009 and 2010, the appellant had declared an
- F income of RM54,000. For the year 2012, the appellant declared an income of RM67,000. The investigating officer did not obtain any information about the income declaration for the years 2006 and 2007. The investigating officer also said that her investigation revealed that the appellant did not have an account with most of the banks in Sabah. The letter from the banks stating that the appellant did not have an account with them was exhibited. Only
- G Maybank Bhd replied that the appellant maintained an account with them. However, he only had RM10.88 to his credit. She said that the appellant also claimed that he worked as a broker. However, he did not produce any documents to the investigating officer as evidence of his earnings as a broker.
- H [13] Although there is no statutory presumption that the property is illegal property, under s. 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988, the accused is obliged to tender evidence on a balance of probabilities to prove his claim that the property is not illegal property and that he is lawfully entitled to it. In the instant case, the only evidence to support the
- I appellant's claim is the salary slips tendered by the officer of the Public Bank and letter of confirmation from the employer in 2006 that the appellant worked for them. The said salary slip only pertains to the period when the

loan application was processed in 2006. On the other hand, the prosecution had tendered evidence to the effect that the source of income of the appellant for the subsequent period between 2006 and 2013 is dubious. In the premises, I agree with the Sessions Court Judge that the appellant should have taken the witness stand to affirmatively tender evidence, either oral or documentary, in respect of the source of his income for the period 2006 to 2013. Since he failed to do so, I find that learned Session Judge had correctly dismissed his claim to the property in question. The appeal is hereby dismissed.

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